

Legislative Drafting

Felix Uhlmann

Bar Ilan Law School

Tel Aviv, January 9-12, 2023



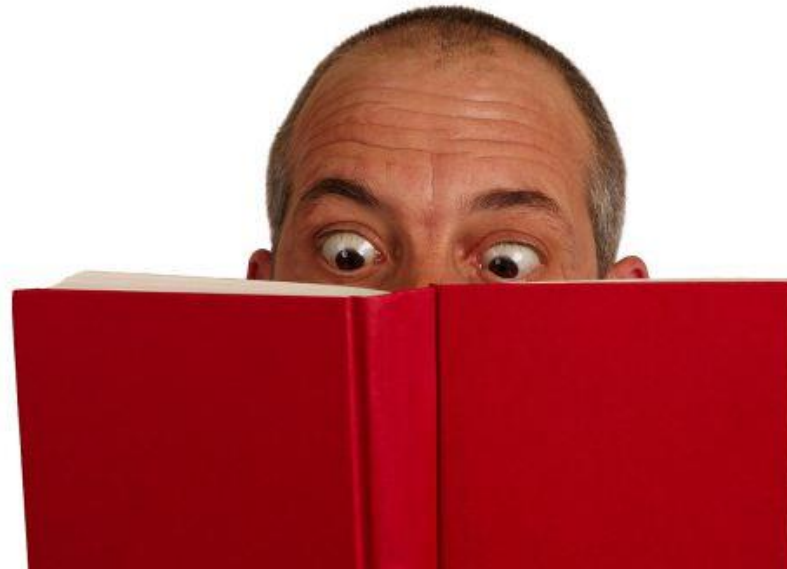
**University of
Zurich^{UZH}**

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I. Addressees

1. Introduction



Who reads your laws?

I. Addressees

2. Addressees' Pyramid

Possible addressees

- Everybody?
- Persons affected?
- Interested laymen?
- Facilitator?
- Specialists?
- Administrative authorities, courts?

Multiple addressees?



I. Adresseees

2. Adresseees' Pyramid

*"Laymen do not read laws" (GEORG MÜLLER)

**"Laien lesen keine Gesetze"



Who reads legislation and why?

While lawyers represent an important group of readers of legislation, typically accessing legislation through a subscription service (whether online or hard copy), there is now a very large audience of non-lawyers who will typically access United Kingdom legislation through www.legislation.gov.uk, which is a free-to-access United Kingdom government site run by The National Archives.⁴ The site has around 2 million separate visitors per month and provides more than 400,000,000 page impressions per year.⁵

ALISON BERTLIN

Loophole 2014, pp. 25 seq.

I. Addressees

3. Right to Understand

Popular Initiative (Switzerland)

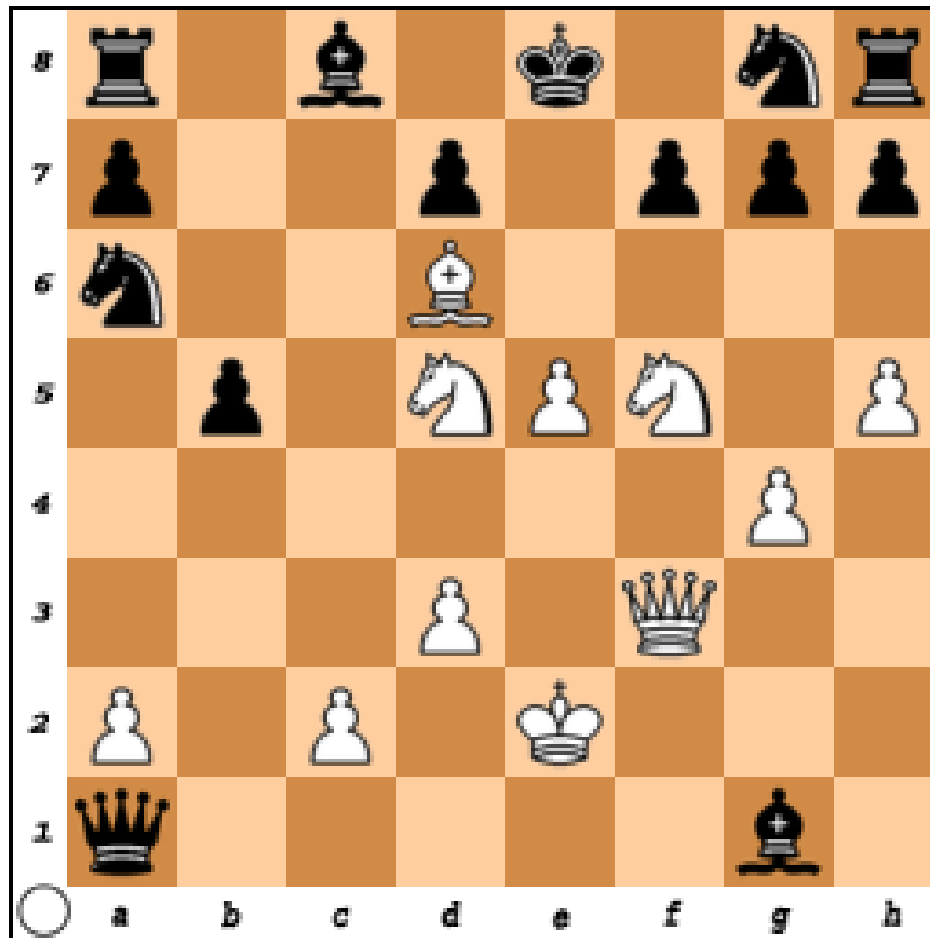
"Every person has a right to laws [...] that are **understandable** and simply, unbureaucratically and efficiently implemented [...]."

Swiss Official Journal (Bundesblatt) 2010, p. 6633

"Toute personne a droit [...] à des lois compréhensibles et à leur application simple, non bureaucratique et efficace [...]." (FF 2010, 6047)

I. Addressees

3. Right to Understand



I. Adresseees

3. Right to Understand

*"Legislator must clearly and exhaustively draw the public's attention to the content of its legislative decision, otherwise the law-abiding citizen will not be able to comply with the norm and to behave accordingly. Neither does satisfy this requirement a norm which requires qualified legal ability and experience as well as archivist diligence, nor one that requires subtle constitutional knowledge, extraordinary methodological ability and a certain desire to solve brain-teasers." **(Austrian Constitutional Court)**

**"Der Gesetzgeber muss der breiten Öffentlichkeit den Inhalt seines Gesetzesbeschlusses in klarer und erschöpfender Weise zur Kenntnis bringen [...], da anderenfalls der Normunterworfenen nicht die Möglichkeit hat, sich der Norm gemäß zu verhalten. Diesem Erfordernis entspricht weder eine Vorschrift, zu deren Sinnermittlung qualifizierte juristische Befähigung und Erfahrung sowie geradezu archivarischer Fleiß vonnöten ist, noch eine solche zu deren Verständnis subtile verfassungsrechtliche Kenntnisse, außerordentliche methodische Fähigkeiten und eine gewisse Lust zum Lösen von Denksport-Aufgaben erforderlich ist."

I. Addressees

3. Right to Understand

Plain language is desirable but ...

- ... may be less precise,
- ... may pretend simplicity but conceal the complexity of the law,
- ... may be more difficult to read for experts,
- ... may falsely suggest to laymen that all legal aspects have been resolved.

II. Normativity

1. Essence of Law

"A cleaning schedule must be established for all production facilities. Planning prevents that inappropriate cleaning procedures affect the quality of milk and of milk products"



(Example of the Swiss Federal Chancellery)

Verordnung über die Qualitätssicherung in der gewerblichen Milchverarbeitung

"Für sämtliche Anlagen und Produktionsräume ist ein Reinigungsplan zu erstellen. Dieser Plan verhindert, dass unangemessene Reinigungsverfahren für die Milch und Milchprodukte ein Hygienerisiko darstellen.

II. Normativity

1. Essence of Law

"Low-beam lights shall also used during the day."

(Example of the Swiss Federal Chancellery)



Verordnung über die Verkehrsregeln und die Signale (Entwurf)

Art. 42 Abs. 6

Die Abblendlichter oder die Tagfahrlichter sollen bei Motorfahrzeugen auch tagsüber eingeschaltet sein.

II. Normativity

1. Essence of Law

Laws contain norms (rules) und nothing but norms. They should not encompass

... descriptions

... explanations,

... reasons,

... declarations

... calls and appeals,

... motives of the law.

Gesetzgebungsleitfaden des Bundes, Bern 2007, N. 926

Erlasstexte formulieren Normen und (fast) nichts anderes als Normen. In einem Erlasstext haben nichts verloren:

- Beschreibungen eines Sachverhalts;
- Erklärungen, warum etwas so ist, wie es ist;
- Begründungen, warum eine Norm aufgestellt wird;
- Appelle an die Adressatinnen und Adressaten;
- Deklarationen von politischen Absichten;
- Motive und Ziele für den Erlass oder einzelne Bestimmungen.

II. Normativity

2. Purpose Article and Preambles

I

(Acts whose publication is obligatory)

REGULATION (EC) No 261/2004 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 11 February 2004

establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91



II. Normativity

2. Purpose Article and Preambles

- (1) Action by the Community in the field of air transport should aim, among other things, at ensuring a high level of protection for passengers. Moreover, full account should be taken of the requirements of consumer protection in general.

- (2) Denied boarding and cancellation or long delay of flights cause serious trouble and inconvenience to passengers.

II. Normativity

3. Legal Definitions

Article 2

Definitions

For the purposes of this Regulation:

- (a) 'air carrier' means an air transport undertaking with a valid operating licence;
- (b) 'operating air carrier' means an air carrier that performs or intends to perform a flight under a contract with a passenger or on behalf of another person, legal or natural, having a contract with that passenger;
- (c) 'Community carrier' means an air carrier with a valid operating licence granted by a Member State in accordance with the provisions of Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers ⁽¹⁾;
- (d) 'tour operator' means, with the exception of an air carrier, an organiser within the meaning of Article 2, point 2, of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours ⁽²⁾;
- (e) 'package' means those services defined in Article 2, point 1, of Directive 90/314/EEC;
- (f) 'ticket' means a valid document giving entitlement to transport, or something equivalent in paperless form, including electronic form, issued or authorised by the air carrier or its authorised agent;
- (g) 'reservation' means the fact that the passenger has a ticket, or other proof, which indicates that the reservation has been accepted and registered by the air carrier or tour operator;

I

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boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91

- (h) 'final destination' means the destination on the ticket presented at the check-in counter or, in the case of directly connecting flights, the destination of the last flight; alternative connecting flights available shall not be taken into account if the original planned arrival time is respected;
- (i) 'person with reduced mobility' means any person whose mobility is reduced when using transport because of any physical disability (sensory or locomotory, permanent or temporary), intellectual impairment, age or any other cause of disability, and whose situation needs special attention and adaptation to the person's needs of the services made available to all passengers;
- (j) 'denied boarding' means a refusal to carry passengers on a flight, although they have presented themselves for boarding under the conditions laid down in Article 3(2), except where there are reasonable grounds to deny them boarding, such as reasons of health, safety or security, or inadequate travel documentation;
- (k) 'volunteer' means a person who has presented himself for boarding under the conditions laid down in Article 3(2) and responds positively to the air carrier's call for passengers prepared to surrender their reservation in exchange for benefits.
- (l) 'cancellation' means the non-operation of a flight which was previously planned and on which at least one place was reserved.

II. Normativity

3. Legal Definitions

Legal Definitions are valuable tools (consistency, shortness) but avoid

- ... self-evident definitions,
- ... "surprise" definitions,
- ... definitions with normative content.

For the purposes of this Regulation:

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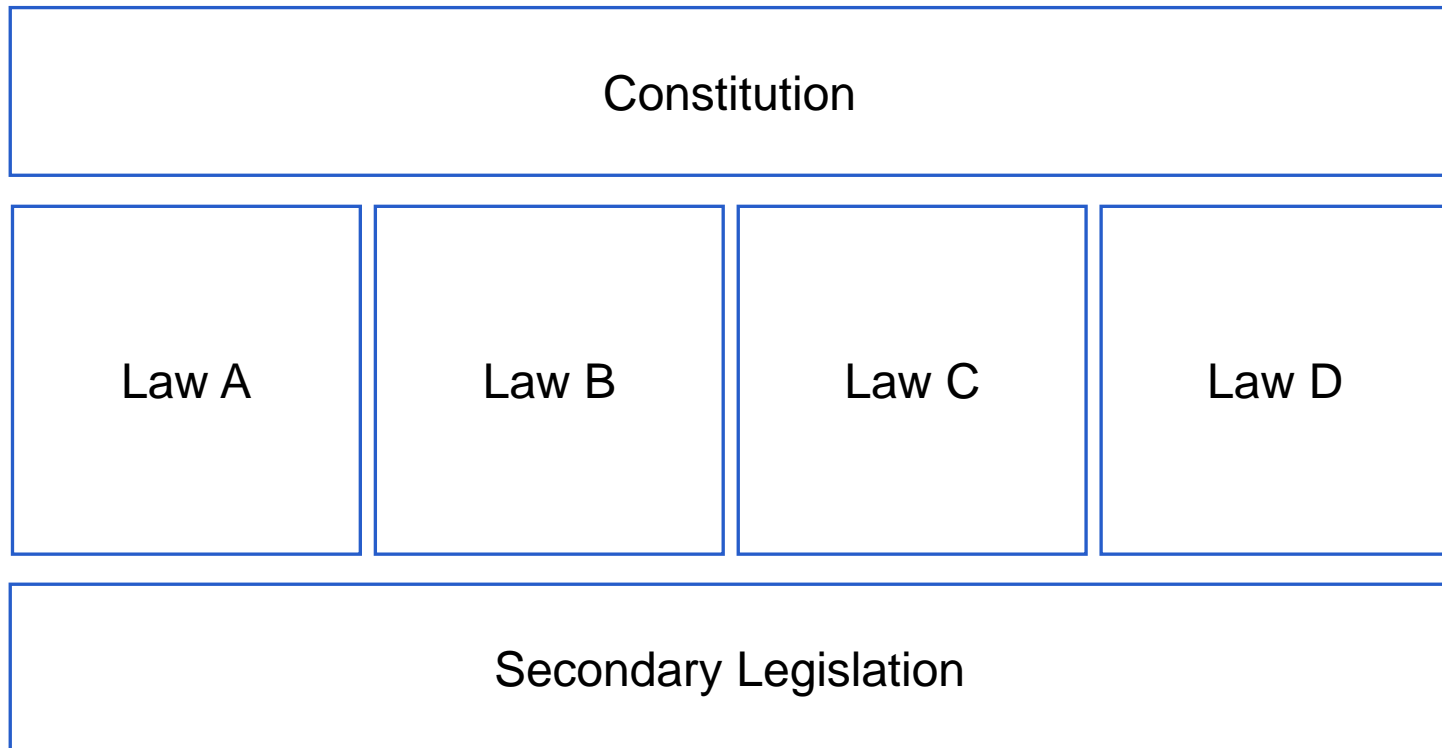
III. Legal Architecture

1. Structure of the Legal Order



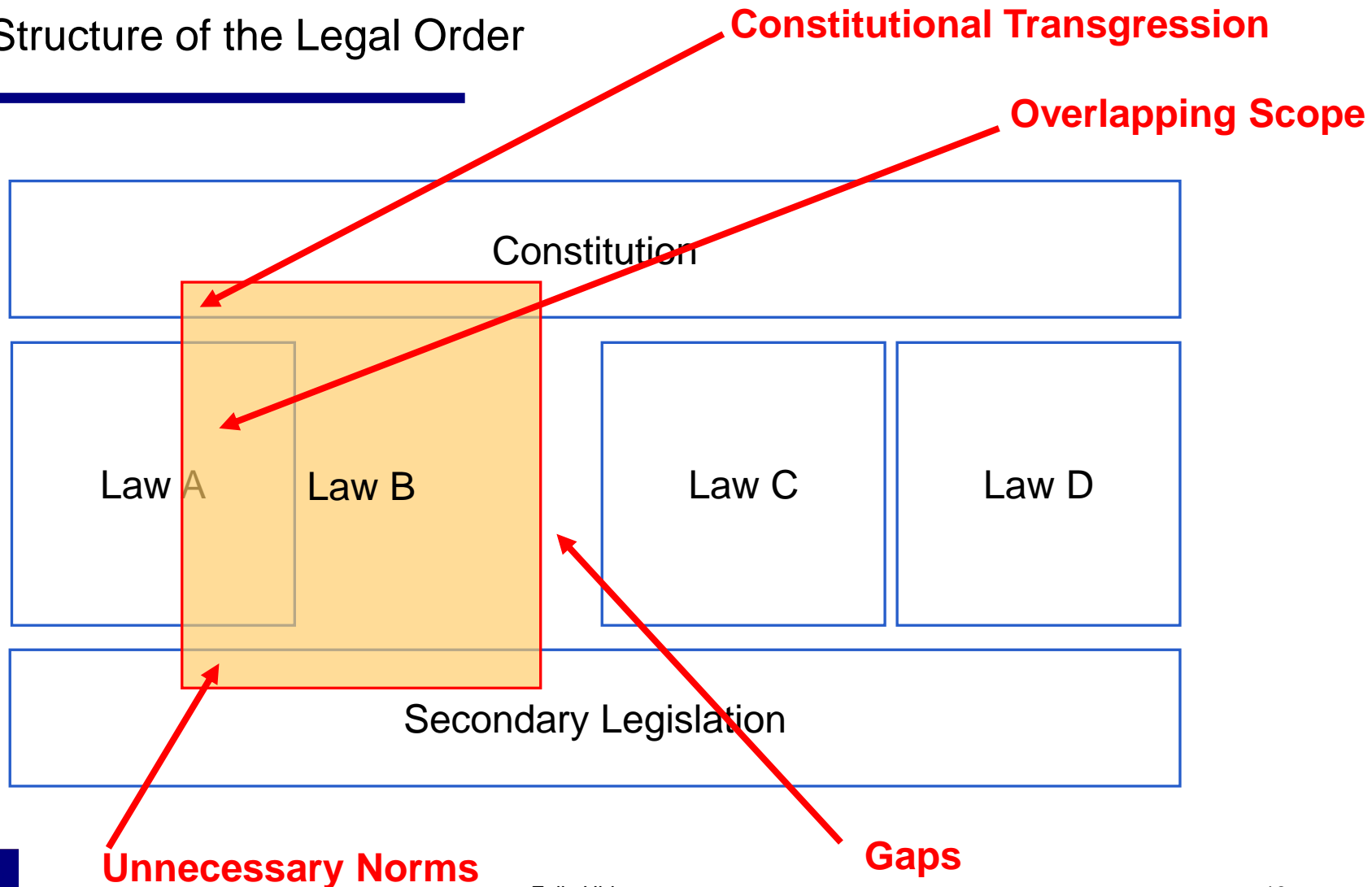
III. Legal Architecture

1. Structure of the Legal Order



III. Legal Architecture

1. Structure of the Legal Order



III. Legal Architecture

2. Scope

Before a new law is passed,...

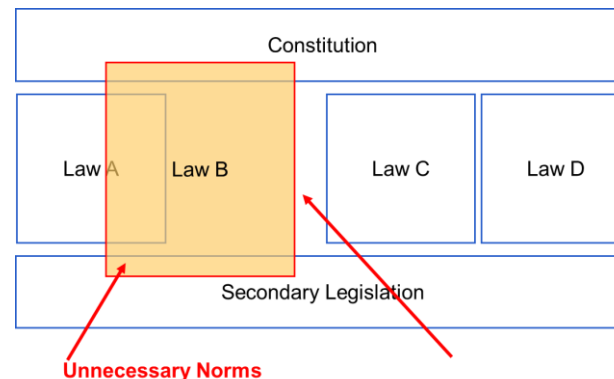
... one must examine whether an existing law may be amended,
**and in case of a new law whether it fits into the legal order,
i.e. the scope of the new law is well tailored**

... personally,

... in substance,

... geographically,

... temporally.



Errors in scope typically lead to unclear legal situations.

III. Legal Architecture

2. Scope

817.0

English is not an official language of the Swiss Confederation. This translation is provided for information purposes only and has no legal force.

Federal Act on Foodstuffs and Utility Articles (Foodstuffs Act, FSA)

of 20 June 2014 (Status as of 1 May 2017)



III. Legal Architecture

2. Scope

Scope in substance (example)

Art. 2 Scope of application

¹ This Act applies to:

- a. the handling of foodstuffs and utility articles, i.e. their manufacture, processing, storage, transport and placing on the market;
- b. the labelling and presentation of foodstuffs and utility articles, their advertising and the information provided about them;
- c. the import, export and transit of foodstuffs and utility articles.

² It applies to all production, processing and distribution levels, including primary production, provided they are relevant to the manufacture of foodstuffs or utility articles.

³ This Act applies to imported foodstuffs and utility articles, unless Switzerland is otherwise obliged in terms of an international treaty.

⁴ This Act does not apply to:

- a. the primary production of foodstuffs for private domestic use;
- b. the import of foodstuffs or utility articles for private domestic use; paragraph 5 is reserved;
- c. the domestic manufacture, handling and storage of foodstuffs and utility articles for private domestic use;
- d. substances and products subject to the legislation on therapeutic products.

⁵ The Federal Council may restrict the import of foodstuffs or utility articles intended for private domestic use.

III. Legal Architecture

2. Scope

Explicit regulation on scopes (example)

Chapter 3⁴¹ Handling Organisms

Art. 29a Principles

Federal Act
on the Protection of the Environment
(Environmental Protection Act, EPA)

of 7 October 1983 (Status as of 1 January 2018)

¹ Organisms must be handled in such a way that they, their metabolic products or wastes:

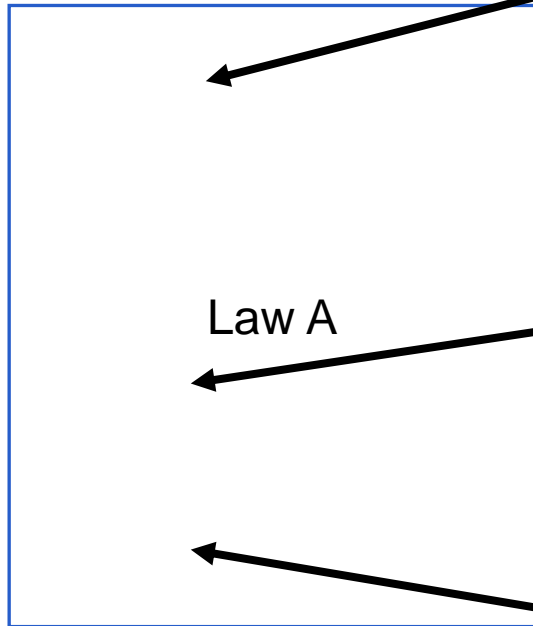
- a. cannot endanger the environment or people;
- b. do not harm biological diversity or its sustainable use.

² The handling of genetically modified organisms is governed by the Gene Technology Act of 21 March 2003⁴².

³ Regulations in other federal acts that serve to protect people's health against immediate danger from organisms are reserved.

III. Legal Architecture

3. Inner Structure of a Law



- Purpose / aim
- Legal definitions
- Scope
- General principles

Substantive provisions in

- logical,
- chronological, or
- factual order, if possible.

- Implementation
- Evaluation clauses
- Transitional provisions
- Sunset clauses
- Commencement

IV. Legal Language

1. Rules of Thumbs (UK)

The pursuit of clarity - general rules

1. Write simply but precisely.
2. Draft for users with their various standpoints always in mind.
3. Be very clear about the purposes of the legislation and make sure that purpose is manifest.
4. Organise material logically, and chronologically where appropriate, at every level (ie the whole statute, Parts, Subparts, sections, schedules).
5. Consider the use of supplementary aids to facilitate communication (diagrams, examples, notes, etc).
6. Develop consistency of style and approach.
7. Revise the text with simplicity and precision in mind (as often as circumstances permit).
8. Test the draft in relation to comprehensibility.

HELEN XHANTAKI, *Thorntons's Legislative Drafting*, 5th ed., West Sussex 2013, pp. 57 seq.

IV. Legal Language

1. Rules of Thumbs (UK)

The pursuit of clarity - rules for drafting sentences

9. Draft in the present tense.
10. Avoid long sentences, particularly if unparagraphed.
11. Prefer the active voice to the passive.
12. Prefer the positive to the negative.
13. Avoid double negatives and beyond.
14. Follow conventional word order.
15. Don't split verb forms unnecessarily.
16. Paragraph with restraint and care.
17. Avoid subparagraphs and sub-subparagraphs.
18. Avoid nominalisations.
19. Use cross-references with restraint.
20. Punctuate conventionally and with restraint.



IV. Legal Language

1. Rules of Thumbs (UK)

The pursuit of clarity - rules for drafting sentences

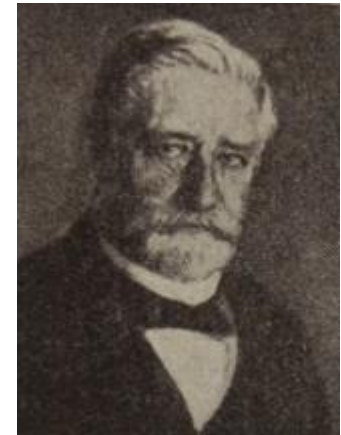
21. Omit unnecessary words.
22. Prefer the familiar word.
23. Choose the exact word.
24. Avoid archaic and legalese words.
25. Avoid non-English expressions.
26. Avoid emotive words.
27. Use informal and recently coined words with distractions.
28. Use one word and not more if one word will do.
29. Use words consistently.

IV. Legal Language

2. Swiss Rules (Eugen Huber)

Eugen Huber, Drafter of Swiss Civil Code of 1907

- No more than three paragraphs per article
- Only one sentence per paragraph
- Only one norm per sentence
- Short and easy sentences
- Cross references only by words (content)



IV. Legal Language

2. Swiss Rules (Eugen Huber)

210

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Swiss Civil Code

of 10 December 1907 (Status as of 1 January 2018)

Art. 541

- b. Effect on issue
- ¹ Unworthiness to inherit applies only to the person concerned.
 - ² His or her issue inherit from the deceased as if the person unworthy to inherit were predeceased.

IV. Legal Language

2. Swiss Rules (Eugen Huber)

II. Capacity to inherit on succession

1. As heir

Art. 542

1 In order to inherit, an heir must be alive and capable of inheriting at the time of succession.

2 If an heir dies after commencement of succession, his or her rights of inheritance in respect of the estate pass to his or her own heirs.

2. As legatee

Art. 543

1 A legatee surviving the testator and capable of inheriting acquires a claim to the legacy.

2 If he or she dies before the testator, his or her legacy is extinguished in favour of the person who would have been obliged to deliver the legacy to him, unless some other intention is evident from the disposition.

3. Unborn child

Art. 544

1 A child is capable of inheriting from the moment of conception onwards, providing he or she is subsequently born alive.

^{1bis} If it is required to protect the child's interests, the child protection authority shall establish a deputyship.⁴⁴⁸

2 If the child is stillborn, it is disregarded for inheritance purposes.⁴⁴⁹

V. Vagueness und Precision

1. Constitutional Limits

Cite as: 576 U. S. ____ (2015)

1

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 13–7120

SAMUEL JAMES JOHNSON, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[June 26, 2015]



V. Vagueness und Precision

1. Constitutional Limits

The Act defines “violent felony” as follows:

“any crime punishable by imprisonment for a term exceeding one year . . . that—

“(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

“(ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*”

§924(e)(2)(B) (emphasis added).

V. Vagueness und Precision

1. Constitutional Limits

Two features of the residual clause conspire to make it unconstitutionally vague. In the first place, the residual clause leaves **grave uncertainty** about how to estimate the risk posed by a crime. It ties the judicial assessment of risk to a judicially imagined “ordinary case” of a crime, not to real-world facts or statutory elements. How does one go about deciding what kind of conduct the “ordinary case” of a crime involves? “A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?” *United States v. Mayer*, 560 F.3d 948, 952 (CA9 2009) (Kozinski, C. J., dissenting from denial of rehearing en banc). To take an example, does the ordinary instance of witness tampering involve offering a witness a bribe?

V. Vagueness und Precision

1. Constitutional Limits

At the same time, the residual clause leaves **uncertainty** about how much risk it takes for a crime to qualify as a violent felony. It is one thing to apply an imprecise “serious potential risk” standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction. By asking whether the crime “*otherwise* involves conduct that presents a serious potential risk,” moreover, the residual clause forces courts to interpret “serious potential risk” in light of the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives. These offenses are “far from clear in respect to the degree of risk each poses.” *Begay*, 553 U. S., at 143. Does the ordinary burglar invade an occupied home by night or an unoccupied home by day? Does the typical extortionist threaten his victim in person with the use of force, or does he threaten his victim by mail with the revelation of embarrassing personal information? By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.

V. Vagueness und Precision

2. Proper Use of Vagueness

Art. 14 Ambient limit values for air pollution

The ambient limit values for air pollution must be set so that, in the light of current scientific knowledge and experience, ambient air pollution below these levels:

- a. does not endanger people, animals or plants, their biological communities and habitats;
- b. does not seriously affect the well-being of the population;
- c. does not damage buildings;
- d. does not harm soil fertility, vegetation or waters.

Art. 25 Construction of fixed installations

¹ New fixed installations may be constructed only if the ambient noise levels emitted from these installations alone do not exceed the planning values in the surrounding area; the planning authority may request a forecast of noise levels.

V. Vagueness und Precision

2. Proper Use of Vagueness

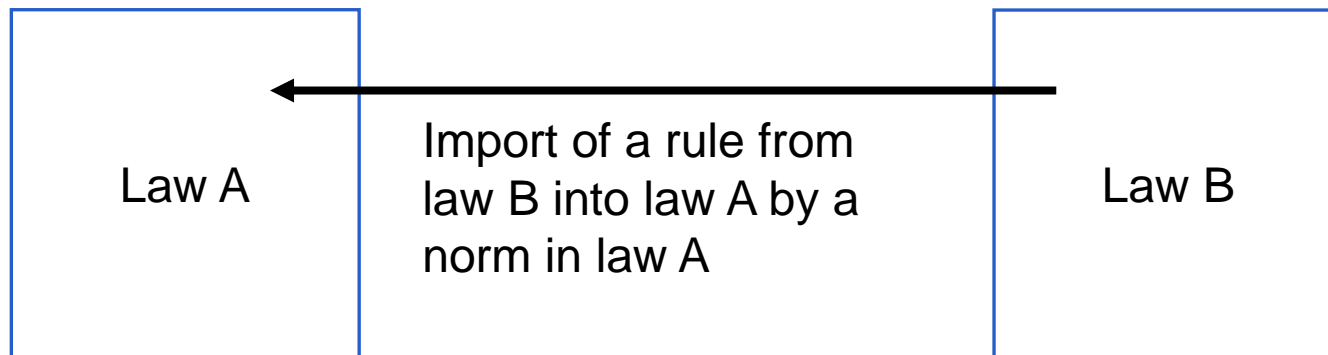


Vagueness ...

- ... may pose a constitutional problem,
- ... may be replaced by more detailed rules (which usually but not always lead to more predictability),
- ... must be justified if a more precise rule is available,
- ... must be thought about in the light who might benefit from it.

VI. Cross References

1. Idea and Benefits



VI. Cross References

1. Idea and Benefits

**Federal Act
on the Protection of the Environment
(Environmental Protection Act, EPA)**

of 7 October 1983 (Status as of 1 January 2018)

Art. 10g Freedom of information in the case of environmental information

¹ Any person has the right to inspect environmental information in official documents and information relating to energy regulations that relate the environment and to request information from the authorities about the content of these documents.

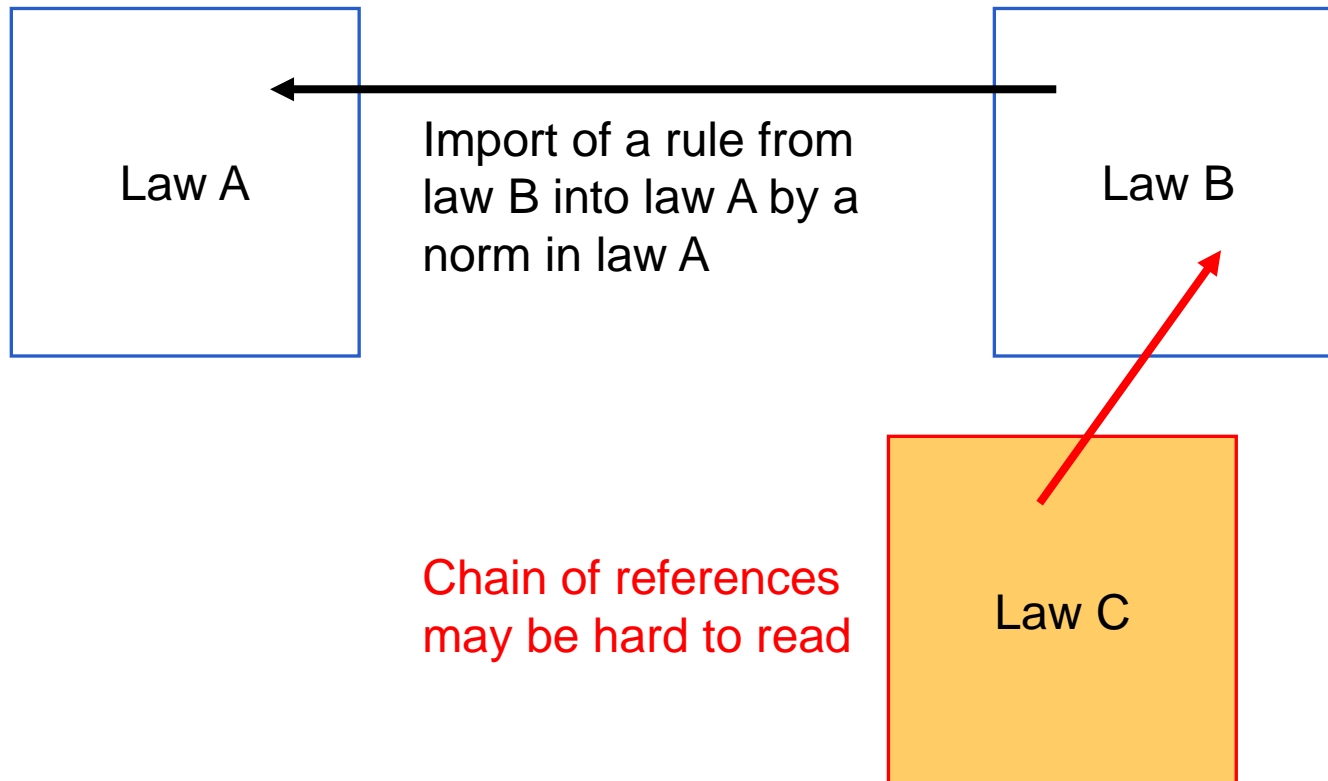
² In the case of federal authorities, this right is governed by the Freedom of Information Act of 17 December 2004²⁹ (FoIA). Article 23 FoIA applies only to documents that contain information under paragraph 1 relating to nuclear installations.

³ The right to inspect also applies in the case of public corporations and private individuals who have been entrusted with enforcement duties but which do not have the power to issue rulings in accordance with Article 5 of the Administrative Procedure Act of 20 December 1968³⁰. In these cases, the competent enforcement authority shall issue rulings under Article 15 FoIA.

⁴ In the case of cantonal authorities, the right is governed by cantonal law. If the cantons have not issued provisions on the access to documents, they shall apply the provisions of this Act and the FoIA *mutatis mutandis*.

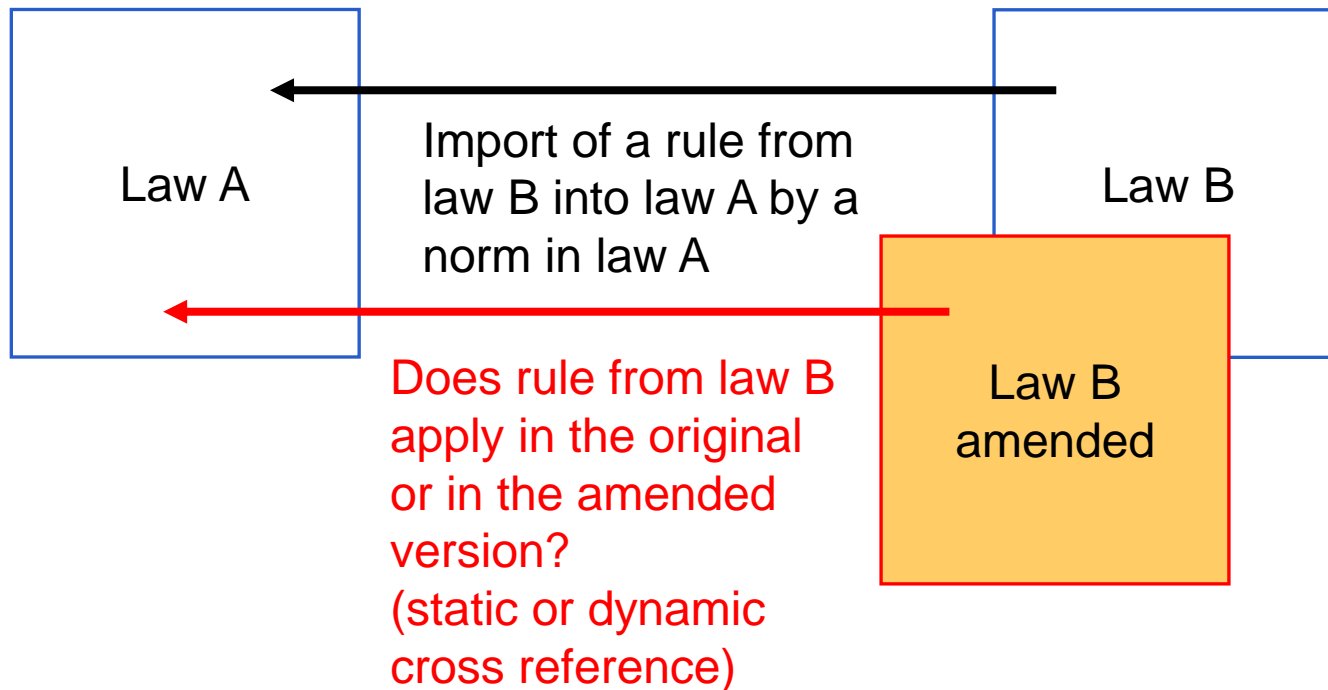
VI. Cross References

2. Caveats



VI. Cross References

2. Caveats



VI. Cross References

2. Caveats

**Federal Act
on the Protection of the Environment
(Environmental Protection Act, EPA)**

of 7 October 1983 (Status as of 1 January 2018)

Art. 39 Implementing provisions and international law agreements

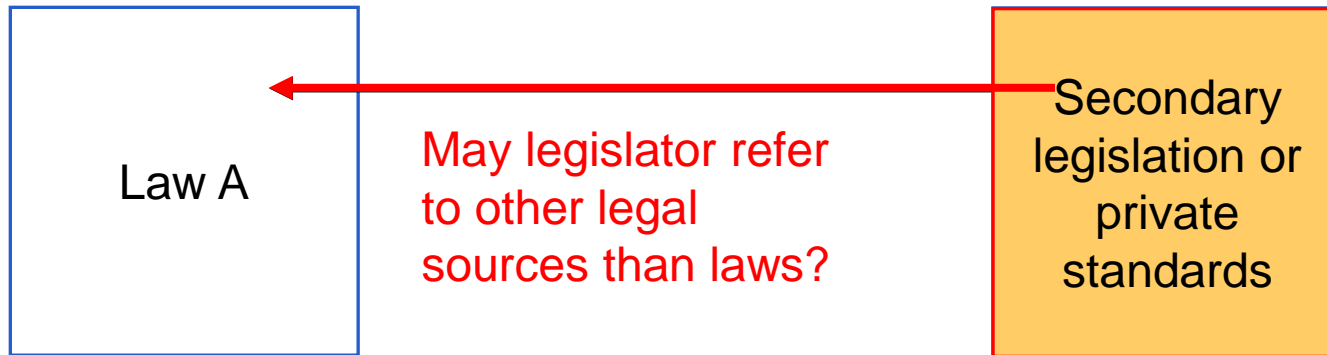
¹ The Federal Council enacts the implementing provisions.

^{1bis} In doing so, it may declare internationally harmonised technical regulations and standards to be applicable and:

- a. authorise the Federal Office responsible to declare subordinate amendments to these regulations and standards to be applicable;
- b. provide that the regulations and standards declared to be applicable are published in a specific manner and that translation into the official languages is dispensed with.⁸²

VI. Cross References

2. Caveats



VI. Cross References

2. Caveats

Cross references are useful because they

... save words,

... enhance consistency,

but should be critically assessed in the light of ...

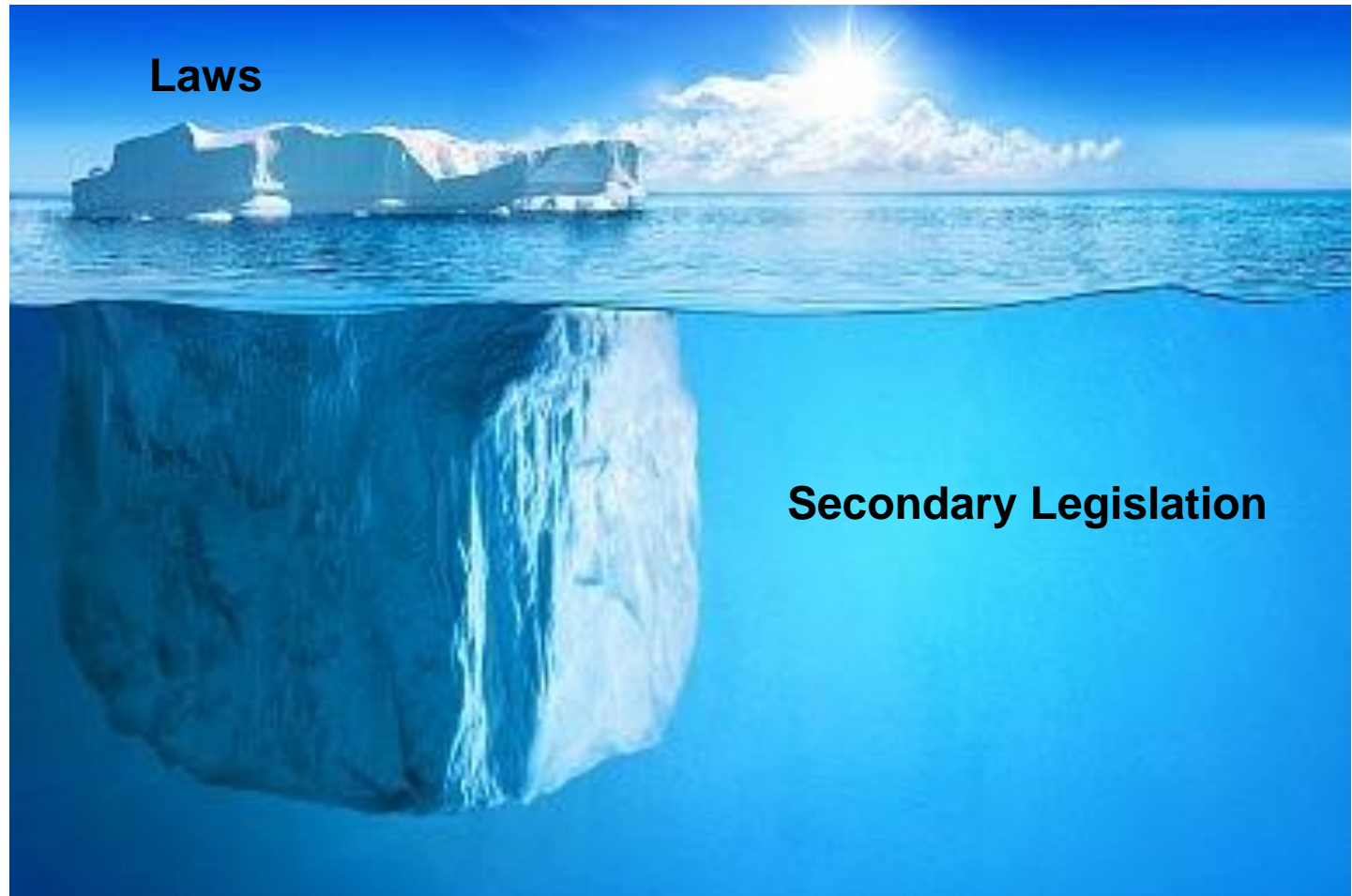
... possible confusion,

... limits by the principle of legality (possible delegation)



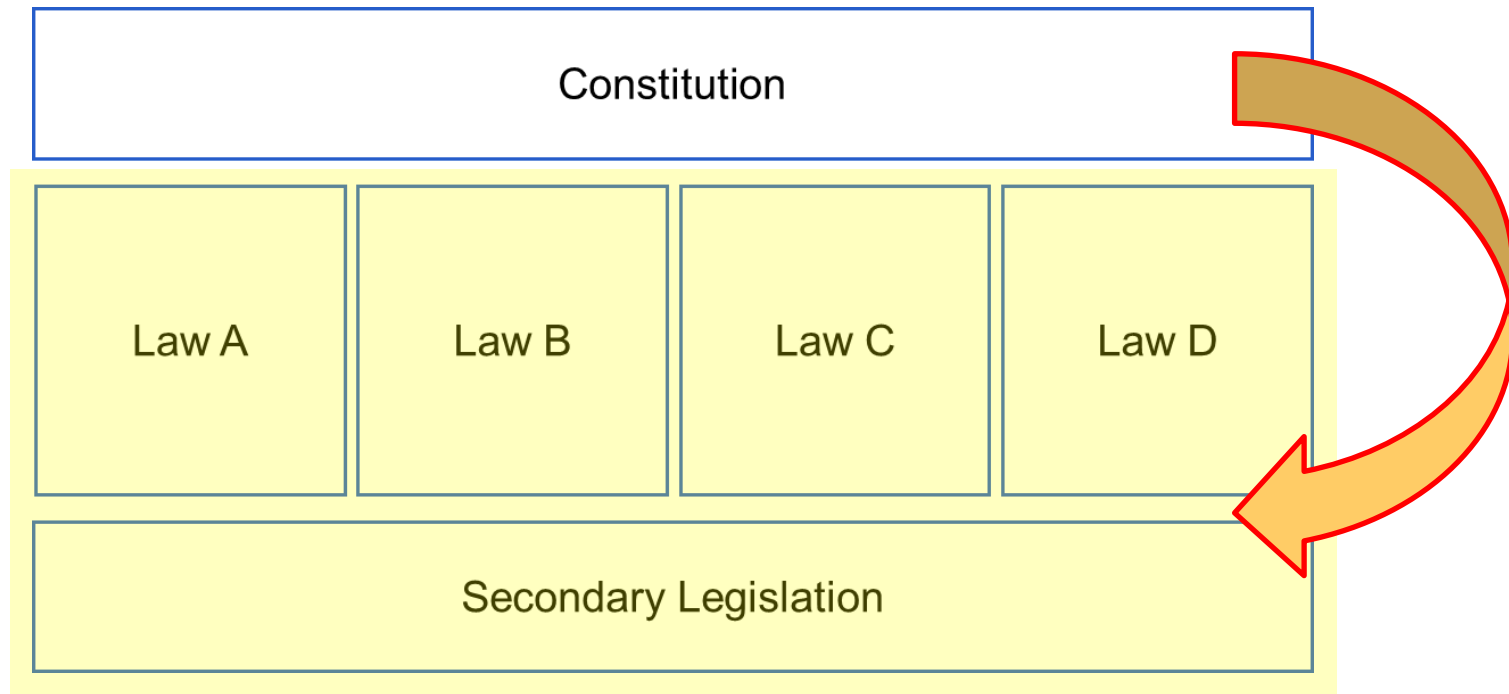
VII. Primary and Secondary Legislation

1. Constitutional Limits



VII. Primary and Secondary Legislation

1. Constitutional Limits



VII. Primary and Secondary Legislation

1. Constitutional Limits

Federal Constitution of the Swiss Confederation

of 18 April 1999 (Status as of 12 February 2017)

Art. 164 Legislation

¹ All significant provisions that establish binding legal rules must be enacted in the form of a federal act. These include in particular fundamental provisions on:

- a. the exercise of political rights;
- b. the restriction of constitutional rights;
- c. the rights and obligations of persons;
- d. those liable to pay tax as well as the subject matter and assessment of taxes and duties;
- e. the duties and services of the Confederation;
- f. the obligations of the Cantons in relation to the implementation and enforcement of federal law;
- g. the organisation and procedure of the federal authorities.

² Legislative powers may be delegated by federal act unless this is prohibited by the Federal Constitution.

VII. Primary and Secondary Legislation

2. Functions of Secondary Legislation

Functions of secondary legislation are ...

- ... concretizing primary legislation,
- ... supplementing primary legislation,
- ... streamlining implementation,
- ... (possibly) guiding courts,
- ... establishing transparency.

VII. Primary and Secondary Legislation

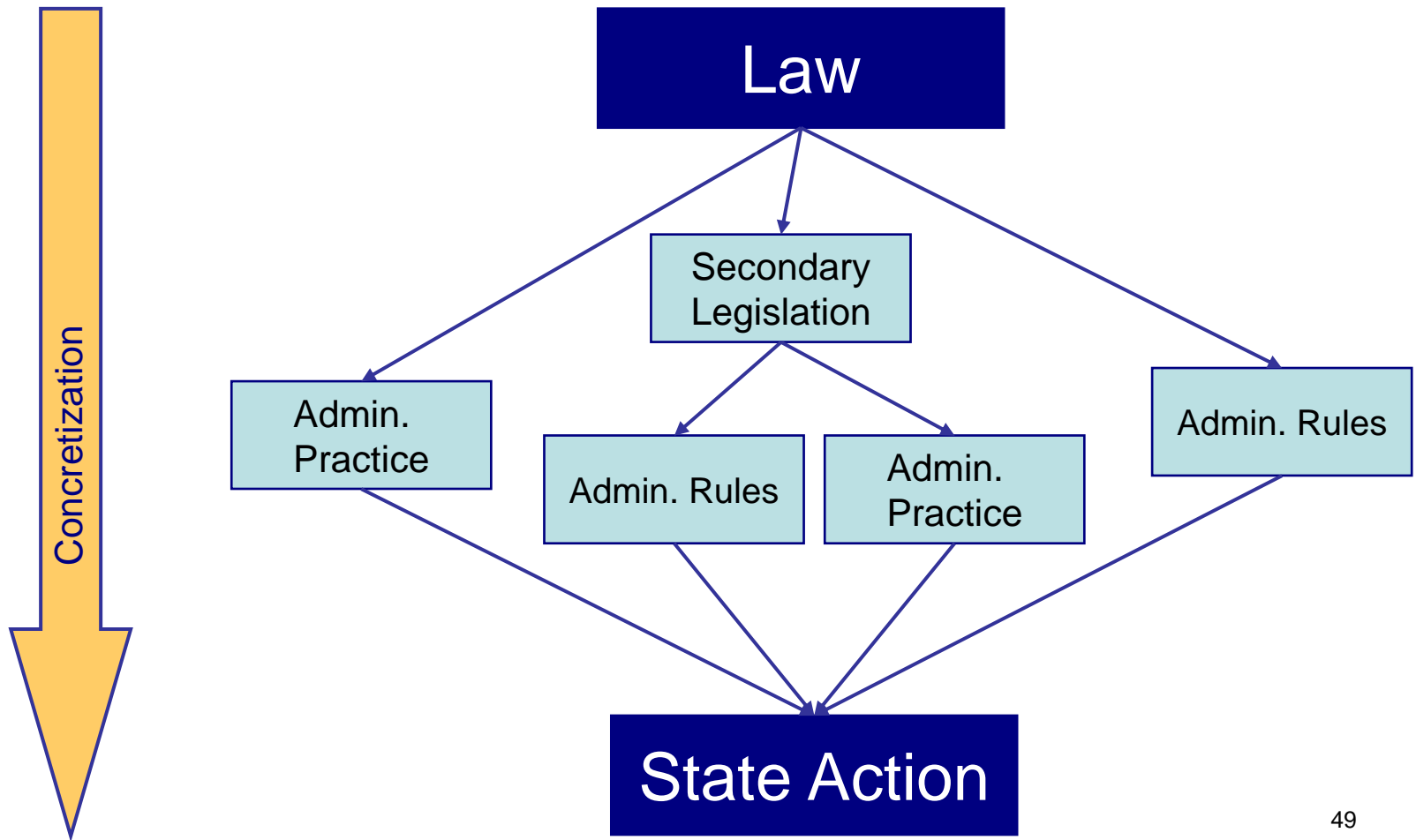
3. Best Practices (and Open Questions)

Secondary legislation must be critically assessed in the light of ...

- ... the principle of legality,
- ... the power of the government and of administrative authorities that comes with the power to enact secondary legislation,
- ... Parliamentary oversight,
- ... publication and consultation procedures,
- ... drafting quality,
- ... management of secondary legislation.

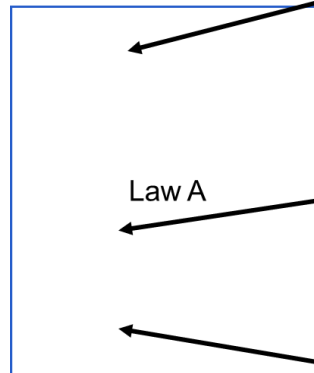
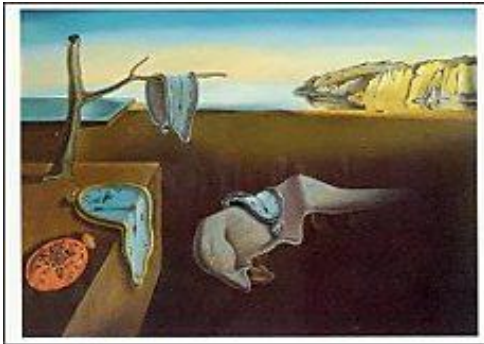
VII. Primary and Secondary Legislation

4. Primary and Secondary Legislation as an Integrated Process



VIII. Transitional Provisions

1. Definition



- Purpose / aim
- Legal definitions
- Scope
- General principles

- Substantive provisions in
- logical,
 - chronological, or
 - factual
- order, if possible.

- Implementation
- Evaluation clauses
- Transitional provisions
- Sunset clauses
- Commencement

Before a new law is passed, ...

... one must examine whether an existing law may be amended,

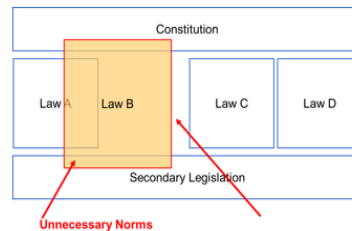
and in case of a new law whether it fits into the legal order, i.e. the scope of the new law is well tailored

... personally,

... in substance,

... geographically,

... temporally.



Errors in scope typically lead to unclear legal situations.

VIII. Transitional Provisions

2. Examples

732.1



English is not an official language of the Swiss Confederation. This translation is provided for information purposes only and has no legal force.

Nuclear Energy Act (NEA)

of 21 March 2003 (Status as on 1 January 2018)

Art. 106 Transitional provisions

¹ Nuclear installations that require a general licence in accordance with the provisions of this Act, and which are already in operation, may continue to be operated without the corresponding licence as long as no changes are made that require an amendment of the general licence in accordance with Article 65 paragraph 1.

² Owners of existing nuclear power plants are required to demonstrate within a period of ten years that arrangements for the management of radioactive waste arising from these plants is assured, if the Federal Council does not already deem this assurance to have been provided. The Federal Council may extend this deadline by five years in justified circumstances.

VIII. Transitional Provisions

2. Examples



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Federal Act on Forest (Forest Act, ForA)

of 4 October 1991 (Status as of 1 January 2017)

VIII. Transitional Provisions

2. Examples

Art. 56 Transitional provisions

¹ The new law applies to proceedings pending on the commencement of this Act. The competent authority according to the old law shall complete the pending proceedings.

² Unlimited deforestation authorisations lapse two years after the commencement of this Act. In individual cases, the competent authority may prolong the deadline on application if the conditions for deforestation are fulfilled. The application must be made before the expiry date. The adaptation of rulings to the new law is reserved.

³ Contractors harvesting wood in the forest are exempt up to five years after the commencement of this Act from the duty imposed by Article 21a, whereby they must demonstrate that the workers employed have completed a federally recognised course raising awareness of the dangers of forestry work.⁸⁷

VIII. Transitional Provisions

3. Evasive Behavior



VIII. Transitional Provisions

3. Evasive Behavior

Federal Constitution of the Swiss Confederation

of 18 April 1999 (Status as of 12 February 2017)

Art. 75b³⁷ Second homes*

¹ No more than 20 per cent of the total stock of residential units and the gross residential floor area in any commune may be used as second homes.

² The law shall require communes to publish their first home percentage plan and a detailed report on its implementation every year.

9.¹⁴⁴ Transitional provision to Art. 75b (Second homes)

¹ If the relevant legislation does not come into force within two years of the adoption of Article 75b, the Federal Council shall issue the required implementing provisions on construction, sale and recording in the land register by ordinance.

² Building permits for second homes granted between 1 January of the year following the adoption of Article 75b and the date on which the implementing provisions come into force shall be null and void.

VIII. Transitional Provisions

4. Summary

Transitional provisions define the temporal scope of an act. Special consideration must be give to ...

- ... existing rights and duties (e.g. licenses),
- ... necessary time to adapt to new regulation,
- ... pending proceedings,
- ... evasive behavior (and the problem of retroactivity)

IX. Practical Questions

Federal Act on Data Protection

Read the Federal Act on Data Protection.

1. Who are the likely addressees of this act?
2. Discuss the aim (goals) of the act.
3. Discuss the legal definitions of the act.
4. Discuss the inner structure of the act.
5. Is article 13 of the act vague? If so why and do you see possibilities to make it more precise?
6. Are there cross references? If so, comment.
7. Do you see room for secondary legislation to this act?
8. Discuss the transitional provisions of the act.
9. What other remarks do you have?

X. Discussion

"Shall"

Use “must” not “shall” to impose requirements. “Shall” is ambiguous, and rarely occurs in everyday conversation. The legal community is moving to a strong preference for “must” as the clearest way to express a requirement or obligation.

First, lawyers regularly misuse it to mean something other than “has a duty to.” It has become so corrupted by misuse that it has no firm meaning.

Second—and related to the first—it breeds litigation. There are 76 pages in “Words and Phrases” (a legal reference) that summarize hundreds of cases interpreting “shall.”

Third, nobody uses “shall” in common speech. It’s one more example of unnecessary lawyer talk. Nobody says, “You shall finish the project in a week.”

<https://www.plainlanguage.gov/guidelines/conversational/shall-and-must/>

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X. Discussion

RIA (Ittai Bar Siman tov)

On the level of primary legislation by the Knesset, impact assessments are indeed very underdeveloped. In theory, in addition to financial impact that you mentioned, there should also be an obligation to do an assessment of the impact on children's rights and women rights. But in practice, it is not really done properly.

הנושא של הערכות השפעה זוכה בהתייחסות מצומצמת וספורדית בלבד בדיני החקיקה הקיימים בישראל, ומוגבל להשפעות תקציביות 252, להשפעות מגדריות 253 ולהשפעות על זכויות ילדים 254. אולם גם הדרישה להערכת השפעה במקרים המצומצמים הללו אינה מגובה במנגנון מספק, ונראה שיישומן של הוראות אלה הוא לעיתים קרובות פורמלי בלבד וחלקי ביותר 255. מכל מקום, נראה כי אין חולק על כך ש"אין בישראל הסדרה בהירה ואחידה של חובת המחוקק לבחון את השפעת החקיקה על זכויות ועל אינטרסים שונים 256, "וכי "הליכים להערכת השפעות אינם חלק אינטגרלי מתהליך החקיקה בישראל בעת הנוכחית."

X. Discussion

Review of Legislation (Ittai Bar Siman Tov)

The most important development (and only case to date in which the Court actually nullified a piece of legislation due to defects in the legislative process) is HCJ 10042/16 Quintinsky v. Knesset (2017). An English translation of the summary of the decision is available here:

<https://versa.cardozo.yu.edu/opinions/quintinsky-v-knesset-summary>

The case represents something of a development of the rule established in the Poultry Growers case. The participation principle established there was restated in a new and more detailed manner. The decision also moved the boundary and somewhat widened the scope of judicial review in regard to an infringement of the right to substantive participation.

X. Discussion

Experimental Clauses (Ittai Bar Siman Tov)

There is some experimental legislation in Israel, and few laws have, in addition to the sunset clause, a clause about data collection and reporting requirements, and very few also create a mechanism or a study for the law's post legislation evaluation. However, it is relatively underdeveloped.

X. Reflection Paper

Questions (choose one)

1. Choose an Israeli law and discuss the purpose article. Does it cover all goals you associate with this law? Why not? Are goals in contradiction with each other? What are the practical consequences of the goals? Etc.
2. Choose an article from Israeli legislation? Is it vague? Does it have to be vague? If not, could the norm it be improved? If yes, what is the purpose of vagueness? Etc.

OR

3. Choose any other topic from the course and treat it in a similar manner as questions 1 and 2, i.e. discuss it on the basis of an Israeli legal text.

Translate the Israeli legal text (google or similar) if there is no English translation available. The translation does not count towards the word count.

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